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## **The judiciary creation by the manipulation of the temporal factor's effects of the declaration of unconstitutionality: a look at the Italian and German constitutional judge**

### **Abstract**

The Italian Constitutional Court has in recent times adopted a particular form of law-making, namely the adjustment of the effects of its acceptance judgements, a decision-making technique previously employed in the past.

Constitutional Judges, straining the norms that regulate the retroactivity of unconstitutionality judgements, have in fact over time even impinged upon the validity and effectiveness of an unconstitutional rule.

This expansion of the Constitutional Court's "creative" powers into the temporal dimension has prompted the reactions of the common judges, who have shown no inclination to assume a respectful attitude towards this temporally creative case law. In fact, time-related determinations have been deemed "unlawful" by the relevant case law; the Court of Cassation, on the other hand, appears to have conformed to the principle of "temporal creativity." For the purposes of this article, an interesting comparison may be drawn with the German model of constitutional justice, which confers extensive legitimacy to the temporal adjustment of acceptance judgements and can avail itself of a wide range of jurisprudential tools, and seems therefore more amenable to a fruitful dialogue between constitutional and common judges.

### **Summary**

#### Introduction

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## Introduction

As a result of some particular recent decisions, a discussion of the Italian Constitutional Court's temporally "creative" powers is again at the centre of the debate concerning constitutional doctrine.

The inherently creative character of the Constitutional Court's activity is manifested on two fronts.

The first refers to judgements of revision that amend the literal content of a regulation, typical of manipulative judgements, whether by addition, partial acceptance or substitution.

The second concerns the temporal "datum" of the judgments; Constitutional Judges, straining the said norms that regulate the retroactivity of unconstitutionality rulings, have in fact even impinged upon the validity and effectiveness over time of an unconstitutional rule.

The "creative" character of the Constitutional Court's decision-making powers raises some problems of legitimacy; not only because its members are not elected by popular vote, but also because its "judging" role has been conceived from its inception in the form of adjudicating on the rejection or acceptance of the question of constitutional legitimacy.

Therefore, the original rigid configuration of the decision-making activity of the Italian Constitutional Court is explained on account of its particular function: that of adjudicating on the laws approved by the Parliament, determining the constitutional lawfulness thereof.

Nevertheless, over the years, the Constitutional Court has not been averse to ruling on the wording of the laws submitted to its jurisdiction and the temporal effectiveness of its decisions; it is precisely for this reason that the debate on the Court's "political-creative" role cannot be said to have subsided.

With this in mind, my contribution will focus, in the first place, on the analysis of some recent judgements where the Italian Constitutional Court established the temporal effects of its own decisions, disregarding the regulations that govern such matters. Secondly, I shall examine the jurisdictional "sequels" of the common judges. Finally, I shall offer an analysis of the judicially developed decision-making tools created by the *Bundesverfassungsgericht* (BverfG) in order to reach not only legislators, but also the common judges. Before examining the three points listed, a theoretical introduction seems necessary and fitting in order to frame the regulation of the effects of the acceptance decisions.

In the first place, we should note art. 136, paragraph 1 of the Constitution which states: "when the Court declares a law or decree-law to be unconstitutional, said law or decree-law shall cease to apply from the day following the publication of the decision." According to the literal wording of the constitutional directive, the prescribed effectiveness appears to be *ex nunc*, as opposed to the retroactive effectiveness accorded to acceptance judgements by art. 30, paragraph 3 of law no. 87 of 1953, which states: "laws that have been declared unconstitutional cannot be applied from the day following the publication of the decision." Nevertheless, "even before law n. 87 was enacted," as an influential Italian school of thought points out, "the retroactivity of judgments was already obtained from the systematic interpretation of art. 136 of the Constitution and from art. 1 of the first Constitution of 1948: which, by providing for incidental questions to be raised to the Court in the course of a common judgement, had fixed the meaning of the constitutional wording."<sup>1</sup> Therefore, the necessary influence that the Constitutional Court decision must exert on the judgement *a quo* requires consideration, in the light of the principle of equality, of the consistency and reasonableness inherent to the retroactive effectiveness of the judgment of acceptance with respect to pendent situations, i.e. "capable of provide material for a judgement"<sup>2</sup>.

All in all, the triad of laws that regulate the effectiveness *erga omnes* and the retroactivity of unconstitutionality rulings appear to be a well-structured, functioning arrangement. As further evidence

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<sup>1</sup> See V. Crisafulli, *Lezioni di diritto costituzionale, Vol II. L'ordinamento costituzionale italiano*, Cedam, Padova, 1984, 387.

<sup>2</sup> See G. Zagrebelsky, V. Marcenò, *Giustizia costituzionale*, Il Mulino, Bologna, 2012, 35.

of the appropriateness of – and indeed the structural need for – retroactive effectiveness of unconstitutionality rulings, we should consider that Kelsen himself had stated, with regard to the retroactive effect on the judgement *a quo*, that it was “*une nécessité technique parce que, sans lui, les autorités chargées de l’application du droit n’auraient pas d’intérêt immédiat et par suite suffisamment puissant à provoquer l’intervention du tribunal constitutionnel*”<sup>3</sup>.

And yet the regulatory framework we have just outlined has been disregarded by the Constitutional Court, when it started to become involved in establishing the effectiveness of its own decisions. It is no coincidence that precisely in the late 80s Italian constitutionalists raised the possibility that Constitutional Judges may eschew the “rigid” retroactivity of unconstitutionality rulings, and at the same time regarded the German constitutional justice – perhaps antithetical to its Italian counterpart – as a characteristically flexible model<sup>4</sup>. The Court’s interest in the consequences of its own decisions may be appreciated in the constraints on the retroactive effectiveness span, since one of the problematic nodes – as pointed out by an authoritative school of thought – resides in the retroactive effectiveness of unconstitutionality rulings in cases where a long time has passed since the entry into force of the law and many of its effects are already consolidated.<sup>5</sup>

Such considerations acquire a great significance when unconstitutionality rulings affect laws and regulations pertaining to taxes, the legal order and social rights.

## 1. Deferred and supervening unconstitutionality judgements

The types of ruling that introduce variations in the effectiveness of judgements “with respect to the past” are known as deferred and supervening unconstitutionality judgements.

Deferred unconstitutionality judgements consist in declaring the contested provision unconstitutional at a later date with respect to the *dies a quo* when the defect of unconstitutionality arose, thus bringing “that *dies a quo* closer to the present time”<sup>6</sup>. The cornerstone of deferred unconstitutionality rulings is the need to avoid a “traumatic” impact on the orderly development of the legal system; some not very recent but significant examples of that need may be found in judgements no. 266 of 1988 and no. 50 of 1989, in which “the Constitutional Court has declared some provisions that failed to guarantee the independence of military penal judges on the one hand, and the publicness of tax tribunal hearings on the other, as contrary to the Constitution”<sup>7</sup>.

According to canonical tenets, this type of decision constrains “the decision’s incidence on previously established and still extant juridical relationships” in order to preclude “the possibility of causing an unacceptable lack of legal protection with respect to values and interests”<sup>8</sup>.

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<sup>3</sup> On this issue see H. Kelsen, *Rapport sur la garantie juridictionnelle de la Constitution*, in *Annuaire de l’Institut International de Droit Public*, Paris, 1929, 127, taken up by R. Pinardi, *La modulazione degli effetti temporali delle sentenze d’incostituzionalità e la logica del giudizio in via incidentale in una decisione di accoglimento con clausola di irretroattività*, Consulta Online, 2015 Fasc. I.

<sup>4</sup> On this issue, see AA.VV., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere*, Atti del seminario di studi svoltosi in Roma, Palazzo della Consulta, nei giorni 23 e 24 novembre 1988, Milano 1989.

<sup>5</sup> See F. Saja, *Introduzione ai lavori del seminario*, AA.VV., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere*, (Quoted).

<sup>6</sup> See R. Pinardi, *L’horror vacui nel giudizio sulle leggi: prassi e tecniche decisionali utilizzate dalla Corte costituzionale allo scopo di ovviare l’inerzia del legislatore*, Giuffrè Editore, Milano, 2007, 116.

<sup>7</sup> On this issue, see M. D’Amico, *Giudizio sulle leggi ed efficacia temporale delle decisioni di incostituzionalità*, Giuffrè, Milano, 1993, 113.

<sup>8</sup> See R. Pinardi, *L’horror vacui nel giudizio sulle leggi: prassi e tecniche decisionali utilizzate dalla Corte costituzionale allo scopo di ovviare l’inerzia del legislatore*, (Quoted), 49.

We also mentioned rulings of supervening unconstitutionality: in this respect, the canonical view has specified that “decisions intended by the Court to constrain the retroactive effects of unconstitutionality rulings are commonly defined as supervening unconstitutionality rulings”<sup>9</sup>.

Yet the latter should only apply in the specific case where a defect of unconstitutionality does in fact supervene.

In particular, such defect shall result from a precise and well defined event, such as “a supervened scientific and technological development or a supervened change in the economic and financial system” and, finally, “from the gradual transformation of the legislative framework in which the norm was included”<sup>10</sup>.

On this same subject, we should also note the existence, in addition to unconstitutionality rulings “in the strict sense”, of the so-called supervening unconstitutionality rulings in the broad sense<sup>11</sup>, where the Constitutional Judge sustains the case for supervened unconstitutionality even though the precise date when such unconstitutionality supervened cannot be determined.

## 2. Judgement no. 10 of 2015

The debate on the faculty to adjust the effectiveness term of rulings intensified as a consequence of judgement no. 10 of 2015, where the Constitutional Court brought the *dies a quo* “closer to the present time.”

The Constitutional Court justified the constraints imposed on the retroactive effectiveness term on the basis of the necessity of safeguarding the state budget: art. 81 of the Constitution was therefore elevated to the rank of overriding principle with respect to the procedural rules that govern the effectiveness of acceptance judgements<sup>12</sup>.

More specifically, the Constitutional Court stated: “*it should be noted that, in the present case, retroactive effectiveness of this declaration of unconstitutionality would entail, first and foremost, a serious violation of budgetary balance as per art. 81 of the Constitution.*” The legal consideration no. 7 constitutes the cornerstone of the temporal manipulation exercised by the Constitutional Court: “*in ruling the contested provisions unconstitutional, this Court must consider the impact of such pronouncement on other constitutional principles in order to evaluate the need to adjust the temporal effects of its decision on extant proceedings.*”

In addition, “*the role of custodian of the constitution as a whole conferred upon this Court imposes upon it the requirement of averting unconstitutionality rulings that would entail, paradoxically, effects that are even more incompatible with the constitution (judgement no. 13 of 2004) than those whereby the provisions were impeached in the first place. In order to avoid such occurrences, the Court should adjust its decisions, including their temporal dimension, in order to prevent a situation where upholding one constitutional principle would entail sacrificing another*”.

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<sup>9</sup> See R. Pinardi, *L'horror vacui nel giudizio sulle leggi: prassi e tecniche decisionali utilizzate dalla Corte costituzionale allo scopo di ovviare l'inerzia del legislatore*, (Quoted), 39.

<sup>10</sup> See R. Pinardi, *L'horror vacui nel giudizio sulle leggi: prassi e tecniche decisionali utilizzate dalla Corte costituzionale allo scopo di ovviare l'inerzia del legislatore*, (Quoted), 51

<sup>11</sup> More specifically, this term indicates the “cases in which the occurrence of the defect is not due to the occurrence of a new constitutional parameter or a new interposed norm, but to other reasons, often associated with a new balance between constitutional values”, see D. Diaco, *Gli effetti temporali delle decisioni di incostituzionalità tra la legge fondamentale e diritto costituzionale vivente*, Consulta Online, 2016 FASC. I.

<sup>12</sup> On this issue, see M. D'Amico, *Relazione introduttiva* al Convegno annuale dell'Associazione “Gruppo di Pisa”, *La Corte costituzionale e i fatti: istruttoria ed effetti delle decisioni*, 2017 June, in the process of being published in the Proceedings of the conference organized by Associazione “Gruppo di Pisa”, [www.gruppodipisa.it](http://www.gruppodipisa.it).

*This Court has already made clear (judgments no. 49 of 1970, no. 58 of 1967 and n. 127 of 1966) that the retroactive effectiveness of unconstitutionality rulings is (and cannot fail to be) a valid general principle in cases brought before this Court; it is not, however, exempt from limitations.”*

The Court justifies this balancing of principles against regulations thus: “*the macroeconomic impact of reimbursing tax payments linked to the unconstitutionality ruling concerning art. 81 paragraphs 16, 17 and 18, and law-decree no. 112 of 2008 and their amendments, would entail in fact such an upset of the state budget as to require the introduction of additional budgetary measures.*”

It is significant that the Constitutional Judge has deemed it apposite, in order to provide a justification for the adjustment of the effectiveness term, to draw a comparison with other foreign courts that exert similar control.

In my modest opinion, interpreting art. 81 of the Constitution as if it constituted an overriding principle and referring to foreign models of constitutional justice are the only foundations upon which the Court has been able, with varying degrees of success, to ground its practice of altering the effectiveness terms, given the lack of a specific juridical base for containing the retroactive effectiveness of unconstitutionality rulings.

In fact, as highlighted by the doctrine, the containment of the retroactive effects should be analysed with reference to the “literature and to the varied procedural instruments, only partly arisen from the domestic positive law and largely fruit of a long case-law development.”<sup>13</sup>

Authoritative voices have been harshly critical of the operative part of the judgement at hand, due to the recessive character the Constitutional Court imparted to art. 30 of law no. 87 of 1953, which is one of the fundamental gears in the incidental mechanism that characterizes the constitutional justice system.

Not only has the Court’s “creativity” been criticized by most experts, but it also affected the follow-up to judgement no. 10 of 2015 by the judge *a quo*.<sup>14</sup>

### **3. The unsuccessful follow-up to judgement no. 10 of 2015**

The Provincial Tax Commission’s pronouncement respected the acceptance by the Constitutional Court of the unconstitutionality claim, but it nonetheless deliberately failed to comply with the constraints on retroactive effectiveness determined by the Constitutional Court.

Such is on the basis of having accorded prevalence to the judgement concerning the underlying justification.

If in fact in its *ratio decidendi* the Constitutional Court justified the need to constrain the effects, the judgement was structured antithetically in relation to the justification. According to the doctrine, “the Court, not having ensured – as in its other precedents (in which, nevertheless, the application of the ruling to the judgement *a quo* was never excluded when it filed a claim of previous unconstitutionality) – that in the same judgement the exception to the principle of retroactivity effectiveness was defined, nor having inserted in the ruling any reference to the justification, the problem therefore arose of conciliating the two parts of the ruling<sup>15</sup>”.

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<sup>13</sup> D. Diaco, *Gli effetti temporali delle decisioni di incostituzionalità tra la legge fondamentale e diritto costituzionale vivente*, (Quoted).

<sup>14</sup> On this issue see A. Morelli, *Principio di totalità e “illegittimità della motivazione”: il seguito giurisprudenziale della sentenza della Corte costituzionale sulla Robin Tax (a proposito di Comm. Trib. Prov. Di Reggio Emilia, 12 maggio 2015, n. 217/3/15)*, Consulta Online, 2015 FASC. II.

<sup>15</sup> See A. Morelli, *Principio di totalità e “illegittimità della motivazione”: il seguito giurisprudenziale della sentenza della Corte costituzionale sulla Robin Tax (a proposito di Comm. Trib. Prov. Di Reggio Emilia, 12 maggio 2015, n. 217/3/15)*, (Quoted).

Therefore, the judge *a quo* affirmed that “the non-applicability of the law declared illegitimate in the judgement *a quo* is consubstantial to the kind of judgement required by our constitutional law: annulling this consubstantiality signifies modifying the kind of definitive judgement and bypassing the necessary intervention of the Constitutional Legislator.”<sup>16</sup>

The judge *a quo* in fact opposed the Constitutional Judge with the intent of safeguarding the structure and framework of incidentality, even at the cost of not proceeding with the *decisum* of the Constitutional Court, obscuring its binding nature.

If the “creativity” of the Constitutional Judge, devoid of any kind of normativisation, can wholly and legitimately author “acts of rebellion” in the judiciary, it should nonetheless be considered, at the same time, that failure to comply of the judge *a quo*, in terms of the temporal “datum” manipulated by the Constitutional Court, was not specifically observed by one part of the doctrine<sup>17</sup>.

In fact, the judgement of the Provincial Tax Commission of Reggio Emilia would go on to constitute a “rather weak artifice”<sup>18</sup> in its argumentative structure.

All the more so, that the failure to comply to common jurisprudence constitutes, de facto, a violation of art. 137 of the Constitution, which provides, in the third subparagraph, that “against the decisions of the Constitutional Court no appeal/challenge is admitted.” As indicated by the doctrine of Morelli, “the Tax Court would seem, then, to have wanted to exercise that sort of institutional right of revolution that, according to doctrinal opinion, would be admissible precisely against the deviations of the Committee, provided that there should be a wide, solid recognition, and not the occasional refusal of an undesirable decision, recognition on the part, primarily, of the doctrine, which would therefore have considerable responsibility in the legitimation of such right.”<sup>19</sup> And if it is in fact true that the duty of the common judges is to proceed with constitutional decisions having merely validity *pro future*<sup>20</sup>, it is equally true that “the common judge may contradict the constitutional justice, reputing it as illegitimate or even only manipulating the sense of such, then this runs openly counter to art. 137 par. 3 of the Constitution, which expresses an essential principle for the functioning of the constitutional justice system: in other words, the judicial authorities must respect the decisions of the Constitutional Judge, giving full implementation as thereby decreed”<sup>21</sup>.

It is also true, however, that the future implementation of the ruling does not leave out of consideration the implementation of “general principles, common to the subjects object of the constitutional justice”<sup>22</sup>. And in fact, the doctrine maintained, “it is frequent, in common jurisprudence, that the retroactivity of unconstitutionality judgements can be subjected to limits.”<sup>23</sup>

As defined above, it seems to validate the theory of the possible existence of a dialogue between the Constitutional Judge and common judges with regard to the “creative” manipulation of the temporal “datum”. And yet there is more. Following the doctrine of D’Amico, the legitimisation of constraining the retroactivity effectiveness *in praeteritum* would lie in the circumstances for which, in some cases, the

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<sup>16</sup> See M. D’Amico, *Relazione introduttiva*, (Quoted).

<sup>17</sup> See A. Morelli, *Principio di totalità e “illegittimità della motivazione”: il seguito giurisprudenziale della sentenza della Corte costituzionale sulla Robin Tax (a proposito di Comm. Trib. Prov. Di Reggio Emilia, 12 maggio 2015, n. 217/3/15)*, (Quoted).

<sup>18</sup> A. Morelli, *Principio di totalità e “illegittimità della motivazione”: il seguito giurisprudenziale della sentenza della Corte costituzionale sulla Robin Tax (a proposito di Comm. Trib. Prov. Di Reggio Emilia, 12 maggio 2015, n. 217/3/15)*, (Quoted).

<sup>19</sup> A. Morelli, *Principio di totalità e “illegittimità della motivazione”: il seguito giurisprudenziale della sentenza della Corte costituzionale sulla Robin Tax (a proposito di Comm. Trib. Prov. Di Reggio Emilia, 12 maggio 2015, n. 217/3/15)*, (Quoted).

<sup>20</sup> On this issue see M. D’Amico, *Giudizio sulle leggi ed efficacia temporale delle decisioni di incostituzionalità*, Giuffrè, Milano, 1993, 103 ss.

<sup>21</sup> F. Ghera, *La “retroattività” delle sentenze di accoglimento in un’interessante pronuncia della Cassazione (nota a Cassazione, Sez. Lav., sentenza 8.7.2016, n. 14032)*, AIC, 2017.

<sup>22</sup> See M. D’Amico, *Giudizio sulle leggi ed efficacia temporale delle decisioni di incostituzionalità*, Giuffrè, Milano, 1993, 105.

<sup>23</sup> M. D’Amico, *Giudizio sulle leggi ed efficacia temporale delle decisioni di incostituzionalità*, (Quoted).

Constitutional Judge would have used the influencing principles on the temporal “datum” that were entirely identical to those adopted by the common judges<sup>24</sup>.

What are such common principles?

In the first instance, they are the principle of *tempus regit actum* in procedural law, the principle of deliverance of the acts carried out by the de facto official in administrative law, and of the principle of covering expenditure. Furthermore, the doctrine proposed some theories of principles that the Constitutional Court could use for the purpose of legitimating the constraint of retroactive effectiveness: that of irretroactivity and reinforcement of past situations, that of the principle of irretroactivity in criminal matters, that of the unconstitutionality supervened as autonomous criterion in the constraint of the retroactive effects<sup>25</sup>.

Perhaps the tension between the “freedom” of the common judges in proceeding with temporally manipulative and necessary constitutional rulings in compliance with art. 137, paragraph 3 of the Constitution, could be resolved in a strongly inclined constructive dialogue between the Constitutional Judge and the common judges: that, indeed, of the application of “common principles”.

The doctrine was manifested in such a way, decreeing that, in the case that the ruling of unconstitutionality should be limited on the basis of criteria different to those just clarified “the jurisprudence would have the possibility and, actually, the duty, not to respect the recommendations provided by the Court.

Such implementations should be valid provided they are the implementation of common principles.”<sup>26</sup>

As regards the jurisprudence of legitimacy, the Court of Cassation seems to have adapted for some time to the constraint of retroactive effectiveness: one need only think of a ruling by the latter, dating from 1989, in which it stated, directly, that: “common judges are permitted to specify (successively) the significance of a previous verdict on unconstitutionality.” More recently, the Court of Cassation demonstrated its adherence to the “inaugurated”<sup>27</sup> constitutional jurisprudence with judgement n. 10 of 2015.

It refers to judgements 17786 of 8.9.2015 and 24549 of 2.12.2015, in which, directly, the Court of Cassation declared that only the Constitutional Court is able to place limitations on the future of the effects of its own ruling on unconstitutionality<sup>28</sup>.

#### 4. The Absence of Facts in the Constitutional Procedure

Judgement n. 10 of 2015 emerges strongly in the constitutional jurisprudence in view of the successive contrasting constitutional jurisprudence.

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<sup>24</sup> On this issue, see M. D’Amico, *La Corte e l’applicazione (nel giudizio a quo) della legge dichiarata incostituzionale*, Quaderni costituzionali, 2015.

<sup>25</sup> M. D’Amico, *Giudizio sulle leggi ed efficacia temporale delle decisioni di incostituzionalità*, (Quoted).

<sup>26</sup> M. D’Amico, *Giudizio sulle leggi ed efficacia temporale delle decisioni di incostituzionalità*, (Quoted), 170.

<sup>27</sup> F. Ghera,, *La “retroattività” delle sentenze di accoglimento in un’interessante pronuncia della Cassazione (nota a Cassazione, Sez. Lav., sentenza 8.7.2016, n. 14032)*, (Quoted).

<sup>28</sup> F. Ghera,, *La “retroattività” delle sentenze di accoglimento in un’interessante pronuncia della Cassazione (nota a Cassazione, Sez. Lav., sentenza 8.7.2016, n. 14032)*, (Quoted).

In fact, still on the subject of “expenditure” rulings, the Constitutional Court operated a sudden *revirement*, not place any restriction to the retroactive effectiveness: specifically, it refers to judgement n. 70 of 2015<sup>29</sup>. Notwithstanding that the declaration of constitutional illegitimacy of the rule subject of the judgement has given rise to a deficit in the accounts decidedly more serious than that which would have arisen from the declaration of constitutional illegitimacy with retrospective effect of the rule subject of judgement no. 10, the so-called *Robin Tax*, the Constitutional Judge has however decided to adopt a “terse” judgement of acceptance, regardless of the manipulation of the temporal “datum”.

What has just been highlighted places a spotlight on a topic much debated by the constitutionalist doctrine: the absence of “facts”<sup>30</sup> in the constitutional procedure.

The critical issues discoverable in the lack of a coherent case law in terms of the temporal effects dictate reasoning regarding the Constitutional Court's power to investigate: the absence of use of formal investigation and the absence of a judicial analysis regarding the impact of the judgements adopted by the Constitutional Court is apparent<sup>31</sup>. Given that all types of decision-making adoptable by the Constitutional Judge can cause burdens for the State, as well as affecting the economic and regulatory fabric of the same, it is however important to note that the “natural” and *erga omnes* efficacy of declaration of unconstitutionality requires reasoning seriously about the lack of a prognostic investigation regarding the potential consequences deriving from the same. The same problem arises, perhaps even with more force, with reference to the additional judgements of performance.

In light of the criticisms advanced by the doctrine, it seems that the temporally “creative” power of the Court can be justified only in light of a complete prior investigation which is diagnostic regarding the facts, and prognostic regarding the consequences afterwards<sup>32</sup>. And this lack of legitimation is reflected in the doctrine, which, in relation to judgement no. 10 of 2015 has affirmed that “to arouse perplexity is not, therefore, the protagonism of the fact in itself in the decision making process followed by the Court, but rather its silent - almost furtive, if one wishes - entry into the process that accompanies an equally evasive presence in the reasoning”<sup>33</sup>. The lack of an adequate reconstruction of the factual data identifiable in the judgement has caused the studios to talk of a “lonely investigation”<sup>34</sup>. And it is perhaps the very absence of an investigation, confronted with the manipulation of the retrospective effect of the declaration of unconstitutionality, damages the dialogue between the Constitutional Court and judges.

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<sup>29</sup> On this issue, see C. Favaretto, *le conseguenze finanziarie delle decisioni della Corte costituzionale e l'opinione dissenziente nell'A.S. 1952: una reazione alla sentenza 70 del 2015?*, Osservatorio sulle fonti, 2015.

<sup>30</sup> On the “facts” in the constitutional procedure see M. D’Amico, *Relazione introduttiva*, (Quoted).

<sup>31</sup> On the powers of investigation see T. Groppi, *I poteri istruttori della Corte costituzionale nel giudizio sulle leggi*, Giuffrè, 1997.

<sup>32</sup> On this issue, see M. D’Amico, *Relazione introduttiva*, (Quoted).

<sup>33</sup> See A. Lanzafame, *La limitazione degli effetti retroattivi delle sentenze di illegittimità costituzionale dei principi costituzionali e bilanciamenti impossibili. A margine di corte costituzionale n. 10/2015*, AIC, 2015.

<sup>34</sup> See G. A. Ferro, *Modelli Processuali ed Istruttoria nei giudizi di legittimità costituzionale*, Torino, 2012, taken up by A. Lanzafame, *La limitazione degli effetti retroattivi delle sentenze di illegittimità costituzionale dei principi costituzionali e bilanciamenti impossibili. A margine di corte costituzionale n. 10/2015*, (Quoted).



## 5. Judgement no. 178 of 2015

Again, in so far as pertains to the creative profile inherent in the constitutional case law of the Constitutional Court, judgement no. 178 of 2015 is noted. Also on that occasion a declaration of unconstitutionality having effect only for the future was adopted.

In this judgement, the Constitutional Court declared the constitutional unlawfulness of the system of suspension of collective bargaining for public works, resulting not only from the contested rules but also from those which extended it<sup>35</sup>. There exists, however, a difference with respect to the judgement no. 10 of 2015: indeed, the constitutional judge has confirmed in the operative part of the ruling, in the reasoning and in the press release “the pronouncement that he was adopting his to considered to be of supervening unconstitutionality”<sup>36</sup>.

This specification is symptomatic of a certain awkwardness experienced by the Constitutional Judge following the “earthquake” in the case law, but also in the doctrine, represented by the judgement no. 10 of 2015: to be specific the insistence with which the judgement under examination has been qualified as a judgement of supervening unconstitutionality indicate the need of the Court to deny having manipulated the effects in time<sup>37</sup>. It is true that no type of reference is made to point 7 of the Review in law of judgement no. 10<sup>38</sup>.

And, yet, notwithstanding the attempt made by the Constitutional Court to adjust its case-law to a canon of transparency fee with regards to reasoning, the manipulation of the temporal element, albeit “masked”, has nevertheless occurred. As the doctrine has had occasion to highlight, the supervening illegality of the contested legislation does not appear to be sufficiently justified; the Court indeed, does not indicate in any way what is the determining *quid novi* (new factor), which today, and only today, leads to the qualification of the legislation as invalid”<sup>39</sup>.

It is considered that the “quid novi” in question would have been identified by the Court in the 2015 law of stability, which would have extended “the negotiating block”<sup>40</sup>.

However, as mentioned earlier, such an occurrence does not appear to be suitable to justify the adoption of a judgement of supervening unconstitutionality, being “weak” at this point which is “badly suited to found a pronouncement of constitutional unlawfulness”<sup>41</sup>.

Not only that, the “weakness” in question manifests itself also by the deferral of the unconstitutionality made by the Constitutional Court, on account “of the time interval which runs from the first of January –date with effect from which the occurrence of the censured defect was configured- to the day following the publication of the judgement of acceptance”. What has just been highlighted leads to qualifying the judgement under examination as a judgement of deferred unconstitutionality, or, even, in my opinion, as a judgement of supervening unconstitutionality in a broad senses, given that, notwithstanding the affirmation of the Constitutional Court, de facto the date with effect from which the occurrence of the

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<sup>35</sup> See M. Mocchegiani, *La tecnica decisoria della sentenza 178 del 2015: dubbi e perplessità*, forumcostituzionale.it, 2015

<sup>36</sup> See R. Pinardi, *La Consulta ed il blocco degli stipendi pubblici: una sentenza di «incostituzionalità sopravvenuta»?*, forumcostituzionale.it, 2015

<sup>37</sup> See R. Pinardi, *La Consulta ed il blocco degli stipendi pubblici: una sentenza di «incostituzionalità sopravvenuta»?*, (Quoted).

<sup>38</sup> See R. Pinardi, *La Consulta ed il blocco degli stipendi pubblici: una sentenza di «incostituzionalità sopravvenuta»?*, (Quoted).

<sup>39</sup> A. Ruggeri, *La Corte costituzionale e la gestione sempre più “sregolata” dei suoi processi*, Nota minima alla sentenza della Consulta n. 178 del 2015, *Questione Giustizia*, 2015.

<sup>40</sup> See M. Mocchegiani, *La tecnica decisoria della sentenza 178 del 2015: dubbi e perplessità*, (Quoted).

<sup>41</sup> See M. Mocchegiani, *La tecnica decisoria della sentenza 178 del 2015: dubbi e perplessità*, (Quoted).

defect of constitutional unlawfulness is registered is not made to coincide with the day following the publication of the judgement itself in the Official Journal.

Therefore, ultimately, the “creative” power of the Court seemed to substantiate itself in a decidedly “masked” modulation.

## 6. The temporally manipulative case law of the BVerfG

That which has just been highlighted does not seem to exist in the context of German constitutional justice.

Prior to confronting the topic of the relationship between the Constitutional Judge and the common judges in the context of the temporally manipulative case law, it is appropriate to set out an introduction. The constitutional case law of the BVerfG is characterised by its high level of pragmatism and flexibility. Not only that, as the Italian doctrine has had cause to highlight, the robust presence of the BVerfG in the German institutional system would have been ascribable in large part to the technical means placed at its disposal, responding to an “arsenal which is much better equipped than that of the Italian Court”<sup>42</sup>. Furthermore, the BVerfG is thought to have contributed significantly to respecting the area of competence of the other state bodies, through the development of a multifaceted array of tools, inclusive of a “differentiated reaction”<sup>43</sup> with respect to the adoption of a declaration of total or partial acceptance; and this in relation to the investigation of a violation of fundamental rights, of which the mere declaration of unconstitutionality is an integral part, as well as the adoption of admonitory declarations, susceptible of being qualified by the addition of terms.

German constitutional declarations operating a modulation of the effects are the declarations of incompatibility and the declarations of interpretation in compliance with the Constitution.

How do the declarations of incompatibility modulate the effects over time?

Declarations of incompatibility are characterised by a declaration of unconstitutionality of a regulation without however causing their elimination from the legislation. The BVerfG, in declaring a regulation merely incompatible, issues an order to the legislator, so that the latter can see to the approval of a regulation “cleaned” of its constitutional illegitimacy flaw. As can be observed, the relation between BVerfG and the legislator consists in a real dialogue, to the point that one could thus consider the phenomenon of “joint removal” of the constitutional illegitimacy flaw, involving BVerfG and the legislator. Having made this premise, consider that the declarations of incompatibility can be of three types: “pure”, integrated by the so-called *weitere Anwendbarkeit* “judicial instrument”, and integrated by a transient regulation issued by the Federal Constitutional Court itself.

The field of application of the declaration of incompatibility coincides with the violation of the principle of equality and with the need to avoid the formation of “regulatory gaps”<sup>44</sup>.

Furthermore, consider that the declarations of incompatibility are adopted by the BVerfG in order to preserve the discretionary power of the legislator. Indeed, it is not a coincidence that declarations of incompatibility contain multiple references to the “*Gestaltungsfreiheit des Gesetzgebers*”; however, according to the prevailing German legal theory, legislative discretionary power cannot constitute the reason for adoption.

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<sup>42</sup> See L. Elia, *Giustizia costituzionale*, Quaderni costituzionali, 1984, 7 e ss.

<sup>43</sup> Benda, Maihofer, Vogel, *Handbuch des Verfassungsrecht s*, Walter de Gruyter, 1984.

<sup>44</sup> G. Cerrina Feroni, *Giurisdizione costituzionale e legislatore nella Repubblica federale tedesca. Tipologie decisorie e Nachbesserungspflicht nel controllo di costituzionalità*, Giappichelli Editore, Torino, 2002.

As for the “creative” manipulation of temporal information made by BVerfG, one needs to consider that it consists in the “temporary freezing of retroactive effects” typical of the declaratory judgement of unconstitutionality in order to preserve the legal, economic and social fabric of the State or of the individual *Länder*. Having clarified this matter, a further consideration is added as premise: sometimes, and in particular in the tax law field, BVerfG contains the retroactive efficacy of the declaration of incompatibility, as it can decree a merely *pro futuro* reform of the regulation affected by the constitutional illegitimacy flaw. The merely *pro futuro* reform deviates from the declaratory judgement of nullity, which is characterised by *ex tunc* efficacy. Again, consider that also the declaratory judgement of incompatibility, even though followed by its retroactive efficacy is nevertheless a significant deviation from *ipso iure* invalidity, which constitutes an essential, if not founding, category of German constitutional law<sup>45</sup>.

However, notwithstanding the apparent rigidity of the German constitutional law model due to the importance of the so-called *Nichtigkeitslehre*, the BVerfG seems to have developed an extremely varied decisional tool kit in terms temporal element manipulation<sup>46</sup>.

So much so, according to a highly respected literature, both in the Constitution and in the BVerfGG there isn’t any explicit mention of the *Nichtigkeitserklärung*, much less of their necessary exclusivity<sup>47</sup>.

So much so that, as mentioned at the start, the very declaration of the Italian Constitutional Court, in declaration no. 10 of 2015, made a reference to the BVerfG, in order to legitimise the deviation from the standard retroactive efficacy of declarations of acceptance: “*besides, the comparison with other European Constitutional Courts - such as for example the Austrian, German, Spanish and Portuguese ones - shows that containment of the retroactive effect of constitutional illegitimacy decisions is a widespread practice, also in incidental declarations, regardless of whether the Constitution or the legislator explicitly confer these powers to the judge of the laws*”.

As can be observed, the Constitutional Court itself has highlighted the “temporally manipulative” traditional of the Constitutional Courts of Spain, Portugal and Germany, distinguishing the “traditions” in question based on whether the rules governing the possibility to “delay” the retroactive efficacy of the declaratory judgement of unconstitutionality were specified or not. In particular, Germany did not operate a complete structuring of the legal theory underpinning the deviation from the retroactive efficacy of the declaration of incompatibility, and this entails the impossibility by the BVerfG to be fully legitimised on an institutional level, considering the fact that failure to define the roles of constitutional bodies - in this particular case, of the German constitutional Court - entails the lowering of the degree of legitimisation of these bodies. However, notwithstanding the possibility to manipulate the temporal information regarding the efficacy of the declaratory judgement of unconstitutionality has not been crystallised in any primary or super-primary legislative text, neither in the German legislation nor in the Italian, one must note a significant difference with regard to outcome of the decision between Italian and German judges with respect to temporally manipulative declarations.

We have seen the Italian jurisprudence and legal theory have not shown to open to dialogue with a “creative” constitutional Judge, who derogates to the regulations in place to govern the “timing” of the declaratory judgement of unconstitutionality: and this, as mentioned, in reason of the severing of the connection of incidentality that arises following the provision establishing the lack of retroactivity of the declaration of unconstitutionality.

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<sup>45</sup>According to article 78 del BVerfGG: “Kommt das Bundesverfassungsgericht zu der Überzeugung dass Bundesrecht mit dem Grundgesetz oder Landesrecht mit den Grundgesetz oder den sonstigen Bundesrecht unvereinbar ist, so erklärt es das Gesetz für nichtig”.

<sup>46</sup> On the flexibility of the BVerfG, see J. Ipsen, *Rechtsfolgen der Verfassungsnichtigkeit von Norm und Einzelakt*, Nomos, Baden-Baden, 1980, 142.

<sup>47</sup> C. Pestalozza, *Verfassungsprozessrecht*, Beck, München, 1991, 346.

On the contrary, the German courts seem instead to have accepted BVerfG's "flexible" jurisprudence in its different variants, as it happened, for instance, with reference to one of the first decisions of incompatibility, adopted by the BVerfG in 1970<sup>48</sup>.

Consider that the declarations of incompatibility of the BVerfG contain precise "orders" with regard to the outcome that the judges must give to the declaration of unconstitutionality. As mentioned at the start of this paragraph, the declarations of incompatibility can be structured in various ways, also and especially due to the procedure by which the BVerfG decides to confer efficacy to these through the intervention of judges and administrative authorities.

In this respect, it should be noted that the normative basis in support of the BVerfG decision's execution consists in article 35 of the BVerfGG, which states that "the Federal Constitutional Tribunal, in its decision, can enstablish who is called to execute ; it can, in individual cases, regulate forms and ways of the execution".

According to the doctrine, the BVerfG, in the ordinance of the 21st of March 1957, qualified itself as "the master of execution", since article 35 of the BVerfGG allows "the full freedom of achieving the object of the order in the most right, rapid, appropriate, simple and efficient way"<sup>49</sup>.

The declarations of "simple" unconstitutionality declare the mere incompatibility of the regulation, and prescribe the judge not to apply the regulation until the legislator intervenes and amends it.

As expressed by the doctrine, the BVerfG, as motivation for the standstill obligation, indicates that "the possibility for the claimant to participate to the positive modification of the law needs to be kept open". If the follow-up of the judges to the "pure" incompatibility decisions can be said existing, it remains the need to consider that, as well stressed by the german constitutional literature, the block of application of the unconstitutional law does not imply always and in any case the arrest of the judges' decisions of the until the new regulation identified by the Parliament<sup>50</sup>.

Still, it is important to consider that the Courts and the administrative authorities can decide not to apply the unconstitutional law and nevertheless define the judgement "referring to the resting part of the law, which is not affected by the declaration of unconstitutionality"<sup>51</sup>.

The BVerfG has also "invented" the variant of rulings of incompatibility distinguished and integrated by the directive of application of the regulation declared incompatible<sup>52</sup>.

The derogation from the principle of suspension is entitled on the basis of the "carrying out of all the circumstances"<sup>53</sup>.

As we can see, the directive of application of the regulation declared incompatible is contrary to the same function carried out by the Constitutional Court. Nevertheless, from the moment that rulings of incompatibility, in general, are adopted by the BVerfG with the aim to "safeguard" the judicial system from the risk that the implementation of the unconstitutionality claim can determine "even more serious"<sup>54</sup> effects, in effect, a reflexion on the "paradoxically unconstitutional" nature of the incompatibility rulings is excluded.

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<sup>48</sup> Steuerprivileg für Landwirte", BVerfGE 28, 227.

<sup>49</sup> G. Cerrina Feroni, *Giurisdizione costituzionale e legislatore nella Repubblica federale tedesca. Tipologie decisorie e Nachbesserungspflicht nel controllo di costituzionalità*, (Quoted), 341.

<sup>50</sup> K. Hein, *Die Unvereinbarerklärung verfassungswidriger Gesetze durch das Bundesverfassungsgericht*, Nomos Gesellschaft, Baden-Baden, 1988.

<sup>51</sup> G. Cerrina Feroni, *Giurisdizione costituzionale e legislatore nella Repubblica federale tedesca. Tipologie decisorie e Nachbesserungspflicht nel controllo di costituzionalità*, (Quoted), 223.

<sup>52</sup> See M. D'Amico, *Relazione introduttiva*, (Quoted).

<sup>53</sup> G. Cerrina Feroni, *Giurisdizione costituzionale e legislatore nella Repubblica federale tedesca. Tipologie decisorie e Nachbesserungspflicht nel controllo di costituzionalità*, (Quoted), 223.

<sup>54</sup> K. Schlaich, S. Koriath, *Das Bundesverfassungsgericht. Stellung, Verfahren, Entscheidungen*, (Quoted).

Yet, as in the Italian case of the judgement n. 10 of 2015, the German common judges could oppose to a similar “temporally manipulative” praxis: in the first instance, based on the failed implementation of a judgement of nullity regarding the assessment of the subsistence of a defect of constitutional legitimacy, and therefore, secondarily, on the failed “physiological” conferral of the retroactive effectiveness to the decision.

Secondly, the resentment of the judges could hypothetically be determined because of the order of application of the rule which is the subject of the question of constitutional legitimacy.

Yet, procedurally, a structured agreement was made between the constitutional court and common courts, in the name of reaching a state of constitutionality only apparently present “in the long term”, and instead already present and subsisting in “short term”, i.e. in the period of time between the date from which the BVerfG adopted the judgement of incompatibility and the moment in which the legislator removed the defect of constitutional illegitimacy through the adoption of a new rule, the cd. *Neuregelung*. In most cases, the judgement of incompatibility is adopted supplemented by a transitional regulation identified by the same BVerfG.

The *Übergangsregelung*<sup>55</sup>, combined with the judgement of incompatibility, is adopted by the BVerfG in order to help and in order to maintain a minimum standard of protection of fundamental rights. Once again, the central node is that of the relationship between BVerfG and municipalities judges are faced with an authentic “creation” legislative operated by the Federal Court. The latest variant of judgements of incompatibility just mentioned is that perhaps it presents the greatest elements of interest with respect to the subject matter of the present *paper*.

If the relationship between the German Federal Court and judges do not seem to be in any way affected by the judgement of incompatibility supplemented by the *weitere Anwendbarkeit*, perhaps because the German municipalities judges will comply with the need felt by the BVerfG, to prevent the creation of a state marked by legal uncertainty, this consideration applies *a fortiori* with reference to judgements of incompatibility integrated from the *Übergangsregelung*, where it adds the problems relating to the creation of the right by the BVerfG.

Yet even in this specific case the German courts seem to react positively to orders imposed “from high up”.

As can be seen, the BVerfG and common courts as well as the administrative authorities in the context of the constitutional law temporally manipulative, seem to move decisively into the same direction, i.e. that the realization of a constitutional state by means of the adoption of instruments of derogations in relation to the declaration of unconstitutionality.

If the dialogue between the constitutional court and common judges in relation to temporally manipulative case law seems unchallenged, one between BVerfG and legislator seems less constant, despite the latter pairs, in most cases, you comply with the order of the reform of rule vitiated.

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<sup>55</sup> See M. D’Amico, *Relazione introduttiva*, (Quoted).

## **Conclusions**

In light of that which has been analysed, it is possible to carry out two considerations.

The first concerns the difficulty to achieve a positive and "generalized" result by common judges with respect to temporally manipulative judgements of the Italian Constitutional Court. The reason, as we have seen, consists of the fear of some judges of sacrificing the incidentality's link, and therefore of sacrificing the duty to do justice in following the judgements of a non retroactive nature.

The second consists of the ease with which the German courts harmonize its jurisprudence with the strongly "creative" of BVerfG, without showing excessive concern with respect to the cutting of the link accident rate, which, particularly within the tax law area, is often sacrificed in the name of the need for a balanced public finance.

Despite the diversity just pointed out, in closing, it is detected that there needs to be a careful use of the temporally manipulative instrument, and that such use is accompanied by a solid motivation at the point of departure from the paradigmatic retroactive effect of a declaration of unconstitutionality, in order to ensure the achievement of a full legitimation of the Italian Constitutional Court and the BVerfG.